JOHN HESTON

IBLA 82-1243 Decided November 10, 1982

Appeal from decision of California State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. CA MC 42410 through CA MC 42414.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on public land must file a notice of intention to hold the claim or evidence of assessment work prior to Dec. 31 of each calendar year, both in the office where the location notice is recorded and in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed because of loss or delay by the Postal Service, the consequences must be borne by the claimant.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or

excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Procedure: Adjudication -- Evidence: Generally -- Evidence: Presumptions --Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment

Although, at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and that he, in fact, did so, in enacting the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), Congress specifically placed the burden upon the claimant to show by his compliance with FLPMA's requirements that the claim has not been abandoned, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.

APPEARANCES: Kenney L. Scruggs, Esq., Bishop, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

John Heston appeals the California State Office, Bureau of Land Management (BLM), decision of July 26, 1982, which declared the unpatented Alhambra, Quartzite, Omega, Clifford, and Black Eagle lode mining claims, CA MC 42410 through CA MC 42414, abandoned and void because no proof of labor or notice of intention to hold the claim was filed with BLM prior to December 31, 1981, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2-1. The proof of labor was received by BLM on December 31, 1981.

Appellant states that he had transmitted the 1981 proof of labor by express mail from Bishop, California, December 29, 1981, after it had been recorded in Inyo County, California. He asserts he used express mail with the knowledge that it is 1-day service, so his document mailed December 29 surely would be delivered to BLM in Sacramento on December 30. He argues that his good faith effort should not be penalized because of inefficiency of the Postal Service. He contends the BLM decision is improper and invalid because it is pursuant to regulations which are in excess of the authority delegated to BLM by Congress; that the regulations are arbitrary and capricious, constituting an improper exercise of discretion as written and applied in his case; that the BLM decision is a taking of property without due process of law; and that the decision leads to an unjust result, depriving him

of property rights acquired by several years of expenditure of money and labor, without any rational reasons and in opposition to the policy against forfeiture and abandonment. Appellant also asks that he be granted a hearing in this matter.

> Section 314(a) of FLPMA, 43 U.S.C. § 1744(a)(1) and (2) (1976) reads:
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> (a) The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:
>
> (1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension of deferment of annual assessment work), an affidavit of assessment work performed thereon, on [sic] a detailed report provided by section 28-1 of Title 30, relating thereto.
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> (2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

[1] Section 314 of FLPMA specifies that the owner of a pre-FLPMA unpatented mining claim must file evidence of assessment work or a notice of intention to hold the claim on or before October 22, 1979, and prior to December 31 of every calendar year thereafter. Such filing must be made both in the office where the notice or certificate of location is recorded, i.e., the county recorder's office, and in the proper office of BLM. These are separate and distinct requirements. Compliance with the one does not constitute compliance with the other. Accomplishment in the proper county of a proper recording of evidence of assessment work or a notice of intention to hold the mining claim does not relieve the claimant from recording a copy of the instrument in the proper office of BLM under FLPMA and the implementing regulations. Enterprise Mines, Inc., 58 IBLA 372 (1981); Johannes Soyland, 52 IBLA 233 (1981). The filing requirements of section 314 of FLPMA are mandatory, not discretionary. Failure to comply is conclusively deemed to constitute an abandonment of the claim by the owner and renders the claim void. Enterprise Mines, Inc., supra; Fahey Group Mines, Inc., 58 IBLA 88 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980); 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a). Congress imposed that consequence in enacting FLPMA. The responsibility for complying with the recordation requirements of FLPMA rests with appellant. This Board has no authority to excuse failure to comply with the statutory requirements of recordation or to afford any relief from the statutory conseqeunces. Lynn Keith, supra.

[2] Arguments similar to those here presented were considered by the Board in Lynn Keith, supra. There we held

> [t]he conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).

53 IBLA at 196, 88 I.D. at 371-72.

[3] Appellant argues that he had no intention of abandoning any of his claims. That issue has been considered by the Board in earlier cases, such as John Murphy, supra at 82-83. There we said:

> [5] Appellants also argue that the use of the term "abandonment" in section 314(c) indicates a significantly different legal connotation from the term "forfeiture," which latter term, appellants note, is typically applied to the invalidation of mining claims for failing to properly record or otherwise perfect claims under Federal statutes. Appellants assert that Congress deliberately chose the term "abandonment" over the term "forfeiture," thus showing Congressional intent to void only stale mining claims as opposed to recently-worked claims like appellants'. They argue that they could not have abandoned their claims because they had no intent to do so and because they colorably complied with section 314. The essence of this argument was presented to this Board in Lynn Keith, supra, in which we said:
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> At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. Farrell v. Lockhart, 210 U.S. 142 (1908); 1 Am. Jur. 2d, Abandoned Property §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. [Emphasis in original.]

Lynn Keith, supra at 197, 88 I.D. at 372.

This result is ineluctable because the sole and fundamental purpose of section 314 is to provide for recordation of certain named instruments. Compliance with this statute requires, by its nature, that the instruments be properly and timely delivered to the prescribed offices, and if this is not accomplished, a claimant's good faith subjective intent to comply is no cure.

Although there have been attacks on the recordation requirements of FLPMA as being unconstitutional, the courts have validated section 314, including subsection 314(c) specifically. For example, when presented with the argument that the conclusive presumption of abandonment acts as a forfeiture statute violative of due process, the Ninth Circuit, in Western Mining Council v. Watt, 643 F.2d 618 (9th Cir.), cert. denied, 102 S. Ct. 567 (1981), stated: "[W]e reject plaintiffs' conclusion that the provisions of section 1744(c) are unreasonably harsh in requiring that mining claims be conclusively presumed to be abandoned upon failure to file." 1/ Thus, the statute's clear provision for conclusive abandonment requires us, on these facts, to find that the decision below is correct. We regret the harshness of this unavoidable result, and we remind appellant that he may relocate the claims, subject to any valid intervening rights of third parties or of the United States, and assuming the availability of the land to mining location, by filing applicable instruments, based on new location dates, as prescribed by the statute and the regulations.

It is not apparent that a hearing would produce any different result from that expressed herein. Accordingly, the request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

1/ In this opinion, the Ninth Circuit relied extensively on the reasoning and language of Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981).